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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

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## Decision

**Matter of:** Superior Gunitite

**File:** B-402392.2

**Date:** March 29, 2010

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Leonard R. Ruzicka, Jr., Esq., Stinson Morrison Hecker, for the protester.  
Gary M. Smith, Esq., Lewis Rice Fingersh, for SAK Construction LLC, the intervenor.  
Parag J. Rawal, Esq., and Jeffrey E. Asbed, Esq., Department of the Army, Corps of Engineers, for the agency.  
Tania Calhoun, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest of the agency's rejection of the protester's proposal as technically unacceptable is denied, where the protester failed to submit a complete technical proposal.

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### DECISION

Superior Gunitite, of Lakeview Terrace, California, protests the rejection of its proposal and the award of a contract to SAK Construction LLC, of O'Fallon, Missouri, under request for proposals (RFP) No. W912P9-10-R-0702, issued by the U.S. Army Corps of Engineers for the rehabilitation of sewers in the Metropolitan Sewer District (MSD), St. Louis, Missouri.

We deny the protest.

The solicitation, issued as a small business set-aside, contemplated the award of a fixed-price contract to the firm submitting the lowest priced, technically acceptable proposal. RFP § 00100, at 14. Offerors were informed that, for a proposal to be found technically acceptable, an offeror must not be on the debarred bidders list and the proposal must receive a satisfactory or higher rating. Id.

The RFP further advised that the agency intended to award a contract without conducting discussions, but reserved the right to conduct discussions if it was deemed to be in the government's best interests. Id. Consistent with this instruction, the RFP set out Federal Acquisition Regulation (FAR) clause 52.215-1, "Instructions to Offerors--Competitive Acquisition." Id. at 2-5. In relevant part, this

clause states that the government intends to evaluate proposals and award a contract without discussions and that, therefore, the “initial proposal should contain the offeror’s best terms from a cost or price and technical standpoint.” However, the RFP also set out Alternate 1 to FAR clause FAR § 52.215-1, which states, in relevant part, that the government intends to conduct discussions with offerors whose proposals have been determined to be within the competitive range, but that the “initial proposal should contain the offeror’s best terms from a price and technical standpoint.” Id. at 5-8.

Instructions for the preparation of proposals were provided, which informed offerors that “[p]roposals must be complete, self-sufficient, and respond directly to the requirements of this solicitation. The offerors shall include both a price proposal, and a copy of the MSD certification.” Id. at 14. With respect to offerors’ technical proposals, the RFP’s proposal preparation instructions identified six technical evaluation factors: past experience, past performance, in-house technical capability, mobilization and on-site management plan, safety programs, and quality control evaluation. For each factor, the RFP provided a detailed description of the information an offeror was required to submit as well as minimum requirements that must be met in order to be technically acceptable, and stated that the government would evaluate the information submitted to determine if it was technically acceptable. Id. at 15-17.

The Corps received four proposals, including Superior’s and SAK’s, which the agency evaluated for technical acceptability. Superior’s proposal was found to be technically unacceptable because the protester failed to provide information addressing many of the minimum requirements identified for each technical evaluation factor. See Agency Report (AR), Tab 7, Consensus Evaluation and Source Selection Document, at 14-17. The agency found that Superior had not (1) demonstrated relevant past experience, (2) provided information establishing its in-house technical capability, (3) provided an adequate mobilization and on-site management plan, (4) discussed its safety program, or (5) provided information about its quality control plan or staff. Id. Discussions were not conducted, and award was made to SAK on the basis of its initial proposal.

The Corps notified Superior that its proposal was rejected as technically unacceptable, because the firm’s proposal did not demonstrate a clear understanding of the solicitation’s requirements given that information requested for four of the six technical evaluation factors was not provided. AR, Tab 8, Notice of Unsuccessful Offer. Superior filed an agency-level protest and, before the Corps could respond, filed the instant protest with our Office.

Superior argues that the agency unreasonably found that Superior’s proposal was technically unacceptable because the RFP did not require offerors to submit a technical proposal as part of their initial proposal submissions. Specifically, Superior contends that it reasonably interpreted the solicitation as requiring only

that it submit a price proposal and have a current certification with the MSD and that it would have an opportunity during discussions to demonstrate its technical acceptability. In this regard, Superior relies on the RFP's instructions that "[t]he offer shall include both a price proposal, and a copy of the MSD certification," and on the solicitations inclusion of Alternate 1 of FAR clause 52.215-1, which indicated that the agency intended to conduct discussions.

In reviewing protests of alleged improper evaluations, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws. See Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. Solicitation provisions must be sufficiently definite and free from ambiguity so as to permit competition on a common basis. Alpha Marine Servs., LLC, B-291721, B-291721.3, Mar. 5, 2003, 2003 CPD ¶ 71 at 4. When a dispute arises as to the actual meaning of solicitation language, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. A solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. Id.

Here, we find that, although the solicitation is poorly drafted, the only reasonable interpretation of the solicitation is the one advocated by the agency—that is, that offerors were required to submit technical proposals as part of their initial proposal submissions. As noted above, the solicitation stated that award would be made to the offeror submitting the lowest priced, technically acceptable proposal. Offerors were informed that "[p]roposals must be complete, self-sufficient, and respond directly to the requirements of this solicitation." RFP § 00100, at 14. The proposal preparation instructions identified technical evaluation factors and described the information offerors were required to submit, as well as minimum requirements that must be met, to be technically acceptable. In this regard, the RFP provided that the agency would "evaluate the information submitted to determine if it is technically acceptable and meets the minimal requirements for this factor. To be rated as acceptable, all of the minimum . . . requirements must be met by the proposal." Id. at 15-17. Reading the solicitation as argued by Superior ignores the instructions concerning the submission of information required for the technical evaluation and the admonition that proposals must be complete and respond directly to the requirements of the solicitation.

Although the solicitation included both FAR clause 52.215-1, and Alternate 1 to that clause,<sup>1</sup> this patent ambiguity did not relieve Superior of the responsibility for filing a

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<sup>1</sup> The inclusion of both clauses creates a patent ambiguity, which Superior was required to protest prior to the closing time for receipt of proposals. See 4 C.F.R. § 21.2(a)(1) (2009). Where a solicitation contains a patent ambiguity, an offeror has an affirmative obligation to seek clarification prior to the first due date for responding to the solicitation following introduction of the ambiguity into the

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complete proposal. In this regard, both clauses informed offerors that their initial proposals should contain their best terms from a price and technical standpoint.

In sum, reading the solicitation as a whole and giving meaning to all of its provisions, the only reasonable interpretation is that initial proposal submissions were required to include information responsive to the requirements set forth for the technical evaluation factors. Superior's proposal did not provide the technical information requested by the RFP, and therefore the agency reasonably found that Superior's proposal was technically unacceptable.

Alternatively, Superior argues, citing the decision of the U.S. Court of Federal Claims in Griffy's Landscape Maintenance LLC, 46 Fed. Cl. 257, 259 (2000), that its failure to provide a complete technical proposal was a clerical error and that the Corps could have asked the firm to provide the information after submission of initial proposals. The Griffy's Landscape decision is inapposite to the situation presented here. The court in Griffy's Landscape found the plaintiff's failure to provide contact information for its insurance carrier was an immaterial omission and a clerical mistake, which the agency should have clarified. Id. at 258-59. Here, on the other hand, Superior failed to provide a technical proposal addressing the RFP criteria, under which technical acceptability would be determined. This failure could not be the subject of clarifications. FAR § 15.306(a)(2) provides that, where as here discussions are not to be conducted, an agency may provide an offeror with the opportunity to resolve minor or clerical errors. Clarifications may not be used, however, to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or revise the proposal. eMind, B-289902, May 8, 2002, 2002 CPD ¶ 82 at 5.

Superior also argues that the Corps could have reviewed the records of the St. Louis MSD, which it alleges would have provided some of the information requested by the RFP to establish technical acceptability. See Comments at 2-3. This argument is without merit. It is not a contracting agency's responsibility to search for information to establish the technical acceptability of an offeror's proposal. Rather, it is the offeror's responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation and allows a meaningful review by the procuring agency. CACI Techs., Inc., B-296946, Oct. 27, 2005, 2005 CPD ¶ 198 at 5. In this regard, an offeror must affirmatively demonstrate the merits of its proposal and risks the rejection of its

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solicitation. Smart Innovative Solutions, B-400323.3, Nov. 19, 2008, 2008 CPD ¶ 220 at 5.

proposal if it fails to do so. See HDL Research Lab, Inc., B-294959, Dec. 21, 2004, 2005 CPD ¶ 8 at 5.

The protest is denied.

Lynn H. Gibson  
Acting General Counsel